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IN THE

# Supreme Court of the United States

October Term, 1961.

## No. 284.

ELLERMAN LINES, LTD. and THE CITY LINE, LTD.,
*Petitioners,*

*v.*

LEIGHTON BEARD,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

T. E. Byrne, Jr.,
Krusen, Evans and Byrne,
21 South Twelfth Street,
Philadelphia 7, Pennsylvania,
*Attorneys for Petitioners.*

International, 711 So. 50th St., Phila. 43, Pa.

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OCTOBER TERM, 1961.

No. .

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*Petitioners,*

*v.*

LEIGHTON BEARD,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioners, Ellerman Lines, Ltd. and The City Line, Ltd. are two British corporations which will hereinafter be referred to as "Ellerman". They respectfully pray that this Honorable Court may grant a writ of certiorari to the United States Court of Appeals for the Third Circuit to review a final judgment of that court entered April 7, 1961, in which rehearing was denied May 31, 1961.*

## OPINIONS BELOW.

The opinion of the Court of Appeals dated April 7, 1961 is reported 289 F. 2d 201. It is set forth in an appendix to this petition.

* Atlantic and Gulf Stevedores, Inc. was a party below. It is filing a separate petition. It is not a respondent as to Ellerman.

## JURISDICTION.

(a) The judgment of the Court of Appeals for the Third Circuit affirming the judgment in favor of the respondent and against these petitioners which had been entered in the United States District Court for the Eastern District of Pennsylvania was entered April 7, 1961.

(b) Pursuant to its rules, the Court of Appeals for the Third Circuit entered an order dated April 18, 1961 extending the time within which petitions for rehearing might be filed to May 19, 1961. Petition for rehearing was filed May 19, 1961 and denied May 31, 1961. The Court of Appeals has stayed its mandate to August 4, 1961.

(c) Jurisdiction to consider the within petition is conferred upon this Court by 28 U. S. C. A. 1254(1), the petition being timely filed under the provisions of 28 U. S. C. A. 2101(c).

## QUESTIONS PRESENTED.

1. Is a shipowner who has engaged the services of an independent contracting stevedore to discharge cargo carried in common carriage by water liable as under principles of vicarious liability for negligence of employees of the contractor which results in injury to one of their fellow-employees?

2. If the first question is answered in the negative, then the question becomes: Does a shipowner engaged in common carriage by water warrant [under the so-called "warranty of seaworthiness"], to a longshoreman offloading cargo at destination that the container, in this case straps around bales, is "seaworthy" when the stevedore elects to offload the cargo by inserting hooks under the straps around the bales, pulling them out of stow and lifting them out of the ship by suspending their entire weight upon two out of the four straps around the bales?

## STATEMENT OF THE CASE.

As a common carrier by water, the petitioners' vessel, CITY OF CALCUTTA, transported several shipments of burlap made up into bales, each bale circumscribed around one circumference by four metal bands or straps. Although loaded in India by a sling around each individual bale, the offloading of the cargo at Philadelphia was by a device having six hooks, each hook at one end of a piece of manila rope.* The opposite ends of each rope were attached to a ring which was in turn placed over the ship's cargo hook. By inserting two hooks, one each under two of the four metal bands encircling the bale, the contracting stevedore was able to pull three bales out of their position in the ship's stow and raise them through the ship's hatch for unloading onto the dock. After this method of discharging had been in use for a number of hours, during which the chief mate of the ship had protested to the contracting stevedore what he considered "a dangerous way of discharging" one of the bands around one of the bales broke, all of the weight of the bale was placed on the other band and it in turn broke. The bale fell into the hold, striking and caroming off cargo still in the hold and rolled, injuring the respondent, one of the longshoremen who had been working in the hold of the ship attaching these hooks to the bands around the bales preliminary to offloading. The respondent, Beard, a Pennsylvania resident, filed a civil action, basing jurisdiction of the Federal Court upon diversity of citizenship [28 U. S. C. A. 1332(a)(2)].

These respondents joined Atlantic and Gulf Stevedores, Inc., the stevedoring contractor with whom they had a written contract under which it performed the offloading operation as an independent contractor, compensated at a stated rate per ton.

The District Court submitted interrogatories to the jury. Upon the basis of the charge in connection with the

* Photographs are at 143a-145a of the Record.

interrogatories, the jury found negligence of the petitioners and unseaworthiness of the ship. The District Court's judgment was appealed. The Court of Appeals did not pass upon the so-called "warranty of seaworthiness" issue, stating that the ground upon which it decided the case made consideration of that issue unnecessary. It did affirm the judgment against the petitioners stating: "The record affords ample basis for the jury's finding that Ellerman was negligent" (Opinion, 7a) * because there was "sufficient evidence . . . adduced . . . to establish that Beard (the respondent) was injured as a result of negligent conduct of the discharging operation . . ." The Court also said that ". . . Atlantic's (the stevedore's) negligence would make Ellerman (petitioner) liable to Beard (respondent) . . ." (Opinion, 14a).

## BASIS FOR GRANTING THE WRIT.

### There Is Conflict Among the Circuits Upon an Important Question of Maritime Law Which Is Prolific of Litigation.

Recently the Court of Appeals for the First Circuit said:

> "The decision that a portion of the ship may be made unseaworthy by an act of a stevedore presents no novel principle. Grillea v. United States, 2 Cir., 1956, 232 F. 2d 919. It is quite another step to say, as plaintiff does, that because a stevedore may have made negligent use or negligent choice, . . . of equipment in which it is bringing freight aboard, the ship becomes unseaworthy. The possible transitory nature of a condition of unseaworthiness has been accented since our opinion herein. Mitchell v. Trawler Racer, Inc., 1960, 80 S. Ct. 926. But we do not believe that unseaworthiness is to be equated with mere negligent conduct.

* Page references to the appendix to this petition.

Cf. Blankenship v. Ellerman's Wilson Lines New York, Inc., 4 Cir., 1959, 265 F. 2d 455 (a case considerably stronger for the seaman). If a winchman employed by a stevedore negligently lowered a boom onto a longshoreman, it would be true, in a sense, that the longshoreman had not been working in a safe place. But absent a showing that the winchman was an unfit individual we could not say that the vessel was unseaworthy." *Arena v. Luckenbach Steamship Co.*, 279 F. 2d 186 at 189; cert. denied 364 U. S. 895.

The Court of Appeals for the Second Circuit has said:

"The inference [in the Court's charge] appears unmistakable that Cyprien could be found liable, despite fully adequate equipment, solely on the basis of its failure properly to supervise the operation. This we think was fatal error."

and again:

"If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien [the shipowner]." *Berti v. Compagnie De Navigation Cyprien Fabre*, 213 F. 2d 397.

The Court of Appeals for the Ninth Circuit has said:

"The jury was not told explicitly that, if the action of Wicks [a longshoreman, a fellow-employee of the plaintiff] were the proximate cause of the injury, no recovery against Royal Mail [shipowner] could be had." *Royal Mail Lines, Ltd. v. Peck*, 269 F. 2d 857 at 859.

The Court of Appeals for the Fourth Circuit has said:

"This argument [liability for negligence of his fellow-employees] relates to the evidence tending to show

> that the plaintiff's fellow-workmen, in removing the draft of lumber from the hold, negligently displaced the lighting appliances so that they thereupon became inadequate. It is contended that if the jury should find that such a state of affairs existed, then there would be a breach of the duty of the owner to furnish a seaworthy ship with its attendant liability . . . (citing cases).
>
> We do not think that this position is tenable . . . The courts have not as yet generally accepted the view that the obligation of seaworthiness has been so extended that a seaman may now recover damages from the shipowner for injuries caused by the negligence of a stevedoring contractor . . . " *Blankenship v. Ellerman's Wilson Line, etc.*, 265 F. 2d 455 at 457.

It is only the Third Circuit which says that the stevedore's negligence would make the shipowner liable to the injured longshoreman. It is only the Third Circuit which imposes liability upon the shipowner to a longshoreman "injured as a result of negligent conduct of the discharging operation" (Opinion, 7a). It is only the Third Circuit which imposes liability upon a shipowner where one of the ship's officers "fail(ed) to take effective measures to stop the use of the discharging method" and that the ship's officers' failure to thus interfere with the method of operation adopted by the independent contractor, the expert in the field, "would constitute negligent conduct for which Ellerman [shipowner] was liable" (Opinion, 9a).

In this regard the Third Circuit seems in direct conflict with the decision in *Oblatore v. United States v. American Stevedores, Inc.*, 289 F. 2d 400 (C. A. 2, 1961), where the court pointed out that since ". . . the United States [shipowner] did not supervise or control the longshoreman, but rather that the work was conducted solely by the longshoremen themselves, we cannot say that in the circumstances of this case the United States violated its duty to

provide the longshoremen with a safe place to work. See *Berti v. Compagnie De Navigation Cyprien Fabre*, 213 F. 2d 397, 400."

**There Is Also Conflict With Decisions of This Court.**

Whatever may be our views of this Court's decision in *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539 and its logic[1] it is certain that this Court *said* that evolvement of fifteen years of decision was "a complete divorcement of unseaworthiness liability from concepts of negligence". Nevertheless, the decision below has equated negligence with unseaworthiness. The Court refused to base its decision upon unseaworthiness but achieved the same result[2] by distorting all rules of vicarious liability and held Ellerman for negligence of the contractor in whose employ respondent was when injured. This is not a mere extension of ". . . liability without fault, analogous to other well known instances in our law".[3] It is the imposition of liability upon shipowner for the negligence of the stevedore, and that is something entirely different, and, we suggest, raises serious Constitutional questions. "But, after all, a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended."[4]

We are not alone in our reading of this Court's decision in *Mitchell*, for the Second Circuit has said:

> "But the teaching of Mitchell is merely that there must be and is a 'complete divorcement of unseaworthiness liability from concepts of negligence.'"[5]

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1. "The moving finger writes and having writ, moves on."

2. For reasons we will discuss hereinafter.

3. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 at 94-95-97.

4. Holmes, J., writing for this Court in *The Eugene Moran*, 212 U. S. 466.

5. *Blier v. United States Lines Co.*, (C. A. 2); 286 F. 2d 920 (1961).

In the case at bar, the Court of Appeals did not base its holding upon concepts of seaworthiness, whether negligently created or not. It held Ellerman liable to Beard for Atlantic and Gulf's negligence. But for the Compensation Act,[6] Beard could have sued Atlantic and Gulf for the damages he sustained attributable to his employer's operating negligence. It is this liability for negligence—not unseaworthiness—which the decision below imposes upon Ellerman.

It is submitted that the rationale of this Court's decisions do not permit this. From *Sieracki* to *Mitchell*, liability has turned upon the "unfitness" of the *res*. If there is any crux about which all of this Court's decisions have been made to turn in cases of this type, it has been the concept of the ship as the offending thing, condemned because of its lack of fitness, even though transitory. It has been this concept and not vicarious liability for the negligence of another which has visited liability upon the owner of the *res*.

**The Concept of Decision Below Raises Constitutional Questions.**

This is a petition for certiorari and must necessarily be as brief as we can make it. Therefore, we merely point out that equal protection applies to these British Corporations, and that ". . . the arbitrariness of a classification, if it is bad enough, may be a violation of the due process clause"[7] and that ". . . discrimination, if gross enough, is equivalent to confiscation . . ."[8]

We are here dealing with the liability of a common carrier by water. This Court's decision in *Parrott v. Wells,*

6. Longshoremen's and Harborworkers' Compensation Act, 33 U. S. C. A. 901, et seq. § 5 of that Act provides that liability thereunder shall be "exclusive" as between employer and employee.

7. *Pacific Natural Gas Co. v. Federal Power Commission*, 276 F. 2d 350 citing this Court's decision in *Bolling v. Sharpe*, 347 U. S. 497.

8. *Steward Machine Co. v. Davis*, 301 U. S. 548 at 585.

*et al.* [*The Nitro-Glycerine* case], 82 U. S. 524 has stood, unchallenged, for the proposition that a common carrier is not chargeable or responsible in damages to third persons, even for explosion of goods transported, in the absence of the carrier's negligence. No liability similar to that imposed upon water carriers is imposed upon carriers by rail, truck or air.[9] It is not imposed upon all shipowners—compare discussion and cases cited, p. 21, *infra.*

The transposition of vicarious liability from the employer to the shipowner is without precedent in our law. It expands "unequal protection". Its Constitutional soundness is questionable, and should be examined by this Court.

In no field of which we have knowledge does the non-expert ship's officer owe a duty to the expert to supervise and control the work method of the contractor who is the expert in the field. We suggest this Court's recent citation and apparent approval[10] of the Fourth Circuit's decision in *Cornec v. Baltimore & Ohio R. Co.*,[11] precludes the Court below in our case from following a completely different innovation. In *Cornec* the Court said:

> ". . . The instrumentalities used for loading and the methods of work, however, are matters within the control of the contracting stevedore. In the absence of some showing that the master directed the use of negligent methods, expressly approved them, or consented to their use, we know of no principle upon which the stevedore can be absolved from liability to the vessel for negligence in using them . . ."

The District Judge submitted this case to the jury under instructions which would have permitted a finding of negligence by the jury upon any one of three grounds, enu-

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9. *Butler v. Norfolk Southern R. Co.*, 140 F. Supp. 601; *Ambase v. Western Maryland R. Co.*, 368 Pa. 1; *Hutchinson on Carriers* § 439.

10. In *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563.

11. 48 F. 2d 497; cert. denied 284 U. S. 621.

merated at the bottom of page 6a of the Circuit Court's opinion. Briefly stated, they are: (a) the use of the hook method of discharging the bales; (b) the failure of the ship's chief mate to stop the stevedore from using that method of discharge; and (c) failing to discharge other cargo in bales destined for another port but which remained in the ship at the time of this accident. The Court says: "We are required only to determine whether there was substantial evidence adduced at the trial with respect to any one of the three theories of negligence on Ellerman's part."

This is fundamentally wrong. The opposite is true. If the court permitted the jury to find Ellerman liable upon any one of three grounds but one of the grounds submitted to the jury was not tenable, then fundamental rules require reversal, because no one can say the jury did not select the untenable ground.

The jury findings must be examined in their setting and not in the abstract. The jury by its answer to interrogatories exonerated the stevedore. In order to do so it had to find that the hook method of discharging bales was proper, and, of course, if the method was proper, then it follows there was no negligence on the part of the ship's mate in failing to stop the discharge. In *State of Maryland v. Baldwin*, 112 U. S. 490, this Court said:

> "On the trial evidence was introduced bearing upon all the issues, and, if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered but its generality prevents us from perceiving upon which plea they found. If therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given."

We will not encumber this petition with citation of the numerous cases which have approved that rule. We pro-

ceed to demonstrate its applicability to the case at bar. If the jury held Ellerman because of the use of hooks in the discharge or because the mate failed to stop the discharge operation when he thought it "dangerous", a verdict thereon is inconsistent with the jury's other finding that the stevedore performed properly. That leaves only one other tenable ground, the method of work which the stevedore employed, electing to discharge the Philadelphia cargo while there was still cargo aboard destined for New York. Thus the holding of the Court of Appeals clearly makes Ellerman liable for the negligence of a contractor and imposes vicarious liability upon the shipowner for the negligence of the stevedore. This extension, or, more properly, distortion of the rule of "unseaworthiness" requires examination by this Court.

**The Finding in Favor of the Plaintiff-Respondent Cannot Be Justified Upon Any Ground of So-called "Unseaworthiness".**

In the District Court the issue of seaworthiness was submitted to the jury under a charge which directed the finding of unseaworthiness of the ship in the following language:

> "Now, if you find that the bands on this bale which fell into this hold, if you so find that it did fall into the hold—although I do not think there is any contradiction—caused him to be injured, and that this rendered the cargo unsafe for the longshoremen to handle, or if you find that the bands of the bale were defective, were inadequate, or insufficient, by reason of that fact, or that it was a proximate cause of the plaintiff's injury, then you might find the defendants liable under the doctrine of unseaworthiness."

The Court of Appeals did not consider it necessary to reach the issue of unseaworthiness which, it said, "was

premised on Beard's view that the doctrine of unseaworthiness extends to the packaging of the ship's cargo, and that the cargo in the instant case was "unseaworthy" by reason of the "inadequacy" of the steel bands used to bind the burlap bales (Opinion, 14a-15a).

It footnoted a statement that the plaintiff relied upon *Reddick v. McAllister Lighterage Co.*, 258 F. 2d 297 (1958) (C. A. 2), cert. denied 358 U. S. 908; but the court relied upon a later Second Circuit decision, *Carabellese v. Naviera Asnar S. A.*,[12] in which the Second Circuit limited *Reddick* to its particular facts and said that it was "not disposed" to extend the doctrine of unseaworthiness to include "cargo safe to handle".

Perhaps the reluctance of the court to further explore this claimed basis of liability was an analysis of a now famous statement by this Court:

> "Formerly the work was done by the ship's crew; but owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners'." *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52.

The *Imbrovek* decision cites a number of authorities, decisional and text. Examination of all of the decisions cited in support of the quoted statement from the *Imbrovek* case will support only the statement that loading and unloading a ship is "clearly identified with maritime affairs". It will not support the statement "formerly the work was done by the ship's crew". Extensive research cited to the Court of Appeals, demonstrates the latter statement to be completely fallacious.

Reviewing hurriedly some of the cases cited by this Court in *Imbrovek*, the *George T. Kemp*, [1876] Fed. Cas. 5,341, contains the statement that "the stevedore is not

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12. 285 F. 2d 355 (1961).

a mariner". All the case holds is that the contract is maritime. The sole question before the Court in that case was whether the stevedore was entitled to a lien.

*The Circassian*, [1867] Fed. Cas. 2,722, held that a stevedore did not have a claim cognizable under admiralty and maritime jurisdiction. *Roberts v. The Windermere*, 2 Fed. 722 [1880] likewise holds that a stevedore had no maritime lien. The Court points out that the unsuccessful side argued that *formerly* mariners performed the work of loading and unloading. The Court's comment upon it is that it was ingenious but *not* supported by authority. We will not here undertake a complete review. Suffice it to say that the cases cited in *Imbrovek* do not support the proposition that, historically, the work of loading and unloading was performed by ship's crew. None of the cases or authorities it cites support the so-called historical concept.

More accurate, as we will demonstrate, is the decision in *Swift v. The Happy Return*, [1799] Fed. Cas. 13,697, where Judge Peters, speaking of the Port of Philadelphia, said:

> "In this port, it is the general custom to hire others than the mariners to lade and unlade vessels. The merchants find it more for their interest so to do than to depend on the mariners, who are particularly ungovernable after a voyage is ended; and are, when arrived at home, impatient under confinement to the drudgery of unloading the cargo."

The same judge in *Dixon v. The Cyrus*, [1789] Fed. Cas. 3,930, notes that: "Men were hired by the day to discharge the cargo . . ."

In an appendix to Volume 30 of the old Federal Cases there is printed, inter alia, the Laws of Oleron and other ancient maritime codes. It is a reprint from 1 Peters' Admiralty Decisions. Peters' Admiralty Decisions (30 Fed. Cas. 1279) were the decisions in the District Court for

Pennsylvania from 1780 to 1806. If history is to be the test, then this would seem to be an appropriate source. A footnote at page 1176 reads:

> "In France the owners of ships receiving freight are not obliged to pay the expenses of loading or unloading, but they form a separate charge against the owners of the cargo."

Article 10 of the Laws of Oleron, printed on the same page, indicates that when the master of the ship "lets her out to freight to the merchants he had to do certain things by way of *familiarizing the merchants with the ropes and slings* so that *they* could judge for themselves if they were sufficient for the cargo *the merchants intended to load.*

At page 1177 of the same volume the following appears:

> "There were formerly, in several ports of Gulenne certain officers called 'arranseurs' or stowers, who were master-carpenters by profession, and were paid by the merchants, *who loaded the ship.* Their business was to dispose right, and stow closely all goods in casks, bales, boxes, bundles or otherwise; to balance both sides, to fill up the vacant spaces, and manage everything to the best advantage. It was not but that the greatest part of the ship's crew understood this as well as these stowers; but they would not meddle with it, nor undertake it, to avoid falling under the merchant's displeasure, or being accountable for any ill accident that might happen by that means. There were also sacquiers, who were very ancient officers, as may be seen in th 14th book of the Theodosian Code. Unica de Saccariis Portus Romae, Lib. 14. Their business was to load and unload vessels laden with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandise otherwise." (30 Fed. Cas. 1177) (Emphasis ours.)

Apparently ships were leased or hired to merchants who did the loading. Article 21 of the Laws of Oleron (30 Fed. Cas. 1180) provides:

> "If a master freight his ship to a merchant, and set him a certain time within which he shall lade his vessel, that she may be ready to depart at the time appointed, and he lade it not within the time, but keep the master and mariners by the space of eight days, or a fortnight, or more, beyond the time agreed on . . . the said merchant in this case shall be obliged to make the master satisfaction for such delay . . . ."

This we take to be evidence that it was not the ship's master or the ship's company which loaded the ship, but the merchant who "freighted" or hired the ship for the voyage, for Article 23 speaks of when a merchant freights a vessel *at his own charge.*

In the same volume, at page 1203, are printed the *Marine Ordinances of Louis XIV.* Under the heading "Of Seaman" (30 Fed. Cas. 1205) the first paragraph reads:

> "The Seamen shall be obliged to appear at the days and places appointed, to take aboard the provisions, rig out the ship, and set sail."

This provision was apparently taken from Article 18 of the Laws of the Hanse Towns, another ancient code.

The same code of Louis XIV, under the heading "Of Freight" provides:

> "2. If a vessel be hired, and the freighter does not put her full loading aboard, the master shall not take aboard any other goods without his consent nor without rendering him an account of the freight.
>
> 3. A merchant not loading the quantity of goods mentioned by the charter party, shall notwithstanding pay the freight as if he had done it; and if he loads any more he shall pay freight for them."

Article V of the Laws of Oleron indicates that when a ship arrived at port and was moored or lying in anchor, and there were "a sufficient number of men aboard to keep the decks and lading," the men might go ashore even without the master's consent if they came back in "good time". It is difficult to see how, if the men who actually sailed the ship were permitted to go ashore with only that reservation, there would have been men available to load or unload.

This Court has referred to what it called the "classic propensities of sailors ashore" [13] in support of its extension of the doctrine of maintenance and cure to the sailor injured on shore.[14]

There is inherent inconsistency here. Both cannot be correct. It has been suggested [15] that when the Court spoke of loading and unloading as work performed by the ship's crew, it was influenced by Dana's "Two Years Before the Mast". Dana does describe one incident in California in 1834 where a crew loaded a cargo of hides, but there was no harbor and no local labor.[16]

That is the only incident in two years. When Dana boarded the ship Pilgrim in Boston, he had nothing to do with loading and arrived on board the ship but a few hours before sailing. On his return to Boston in 1836 aboard the "Alert", Dana describes [17] how the crew manned the capstan to dock the ship and

> "the last turn was made fast and the crew dismissed; and in five minutes more not a soul was left on board

13. *Aguilar v. Standard Oil Co.*, 318 U. S. 724 at 731.

14. See also *Warren v. United States*, 340 U. S. 523; *The Quaker City*, 1 F. Supp. 840; *Bentley v. Albatross S. S. Co.*, (C. A. 3) 203 F. 2d 270; *Fuentes v. Panama Canal Co.*, 146 F. Supp. 303; *Grovell v. Stockard S. S. Co.*, 176 F. 2d 121; *Nowery v. Smith and Johnson*, 161 F. 2d 732.

15. W. McFee, "The Law of the Sea" (N. Y., 1950, page 175).

16. R. H. Dana, "Two Years Before the Mast" (Boston, 1911, pages 93, 94, 119, and 120).

17. Ibid., page 461.

the good ship Alert but the old ship-keeper, who had come down from the counting house to take charge of her."

Melville [18] is speaking of a sailor in port in Liverpool in 1837 when he says:

"As we had nothing to do with the cargo, of course, our duties were light enough; and the chief mate was often put to it to devise some employment for us . . ."

Samuels [19] described only one instance where the crew unloaded cargo. This occurred at Odessa during the plague. Lighters were set adrift near the ship where it lay anchored in the harbor, caught by the crew, brought alongside and the cargo loaded into the lighters which were then set adrift to be picked up by the Russians. Samuels describes [20] paying off his crew and discharging the cargo afterward. Kelly's work [21] deals with the period immediately following the American Revolution, but makes no mention of crew handling cargo, although he does speak of "lumpers" (page 72), "waterman" (page 161) and "gangs" unloading chests of soap (page 35).

English experience and history bears out our thesis. Unwin [22] speaking of London in November of 1282 says that the unloading of wine at Vintry Wharf was performed by "four gangs of winedrawers of twelve men each, for the union rule is that there shall never be less than twelve men to a job of this sort".

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18. Herman Melville, "Redburn" (New York, 1924, page 154).

19. Captain Samuel Samuels "From the Forecastle to the Cabin" (New York, 1887, page 193).

20. Ibid., page 240.

21. Samuel Kelly, "An Eighteenth Century Seaman" (New York, 1925, C. Garstin Edition).

22. "Finance and Trade Under Edward III", George Unwin, Editor (Manchester, England, 1918, page 22).

The same author says:[23]

> "The Thames lighterman and the Billingsgate porter are perhaps the most picturesque, as they are certainly the most ancient types of London industry. Their modes of work have varied very little during the twenty centuries since the Romans brought them—if indeed they did not find them."

Salzman[24] says:

> "The crew was not bound to stow the cargo, and the patron [the ship's owner] was bound to find for the purpose men who understood the business."

Prior to the erection of the wet docks in London about 1800, ocean-going ships moored in the Lower Thames in anchorages such as Blackwall, Deptford and North Fleet, where loading and unloading took place, often by rolling barrels, hogsheads and similar containers on and off the lighters. The "ticket porters" who did the work were tightly organized into brotherhoods.[25]

> "No labour in the port could be performed by any other person whilst there was a sufficient number of these men offering themselves."[26]

After the erection of the wet docks in London, necessary because of the great rise and fall of the tide, vessels were docked there and "all her crew, save for one responsible officer, had to leave her. Only men employed by the dock company were allowed to discharge under the direction of one of the company's own foremen."[27]

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23. "The Guilds and Companies of London," George Unwin (London, 1908, page 352).

24. "English Trade in the Middle Ages," L. F. Salzman (Oxford, 1931, page 236).

25. "History of the Port of London," Sir J. G. Broodbank (London, 1921) Vol. 2, page 372.

26. Broodbank, *supra*, at page 430.

27. "The Port of London," J. Grosvenor (London, 1957, page 64).

In Peiraeus in Ancient Greece, sailors and dock workers are mentioned as separate categories of endeavor,[28] and at Delos and Alexandria the two belonged to separate guilds.[29]

The history of Rome, both of the city and the empire, is similar. While its warships were propelled by oars, its merchant ships were propelled by sails.[30] The port of Ostia at the mouth of the Tiber served the city. Seawalls were erected to provide a sheltered harbor, but space was limited and the necessity for swift loading and unloading required men skilled in the task. The area within the seawalls had numbered berths "for the efficient distribution of unloading gangs".[31] There were even specialized groups within the overall group of longshoremen. There were grain unloaders [saccarii] and men who unloaded the general cargo [geruli].[32]

There is other material of a different nature. Records before and after the Revolution show that it was customary to pay for loading and unloading at Boston,[33] Salem,[34] and Beverly.[35] These charges were for the services of longshoremen employed by shoreside companies, not unloading by the ship's crew.

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28. "Ancient Greece at Work," G. Alotz (New York, 1926, pages 171 to 301).

29. "Social and Economic History of the Hellenistic World," U. Rostovtzell (Oxford, 1941) Vol. 1, page 397; Vol. 2, page 788.

30. "The Sailing Ship," R. and R. C. Anderson (New York, 1926, page 47).

31. "Roman Ostia," R. Meiggs (Oxford, 1960, page 163).

32. "An Economic Survey of Ancient Rome," T. Frank (Baltimore, 1940) Vol. 5, page 250; See also "The Ancient Mariner," L. Casson (New York, 1959, page 193).

33. "The House of Hancock," W. T. Baxter (Cambridge, 1945, page 126).

34. "The Diary of William Bentley" (Salem, 1905) Vol. 1 [April, 1784—December, 1792] page 143.

35. "The Jacksons and the Lees, Two Generations of Massachusetts Merchants, 1765-1844," K. W. Porter (Cambridge, 1937) Vol. 1, page 418.

Whether work was performed by the ship's crew or not is not a question of law at all. It is a question of fact.

With respect to the seaworthiness of cargo and the container in which cargo is packed, the courts are not free to write as upon a clean slate. Congress has entered the field, along with other major nations of the world, and as the result of International Convention,[36] Congress has adopted statutes such as the Carriage of Goods by Sea Act, 46 U. S. C. A. 1301 and the Harter Act, 46 U. S. C. A. 191-196. Under COGSA the carrier is required to make his ship seaworthy, properly man, equip and supply it, and issue a bill of lading which, inter alia, must show the *apparent* order and condition of the goods. Neither the carrier nor the ship is responsible under this legislation for insufficiency of packing or latent defects of the cargo.[37] Neither the carrer nor the ship is responsible for losses with respect to cargo which arise without the actual fault and privity of the carrier.[38] It is clear from a reading of the Harter Act that the Congressionally established norm with respect to the carrier and the cargo is due diligence.

We respectfully suggest that for a court to attempt to pre-empt the legislative function by writing some new warranty into this setting would only further confuse an already muddled picture.

It is respectfully submitted that recovery by the respondent against the petitioner here should not be sustained by any theory of warranty with respect to the cargo, or more properly the container in which cargo is packaged. As this Court has said:

> "We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups." *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282 at 286.

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36. Brussels, 1924.
37. 46 U. S. C. A. 1304(2)(n)(p).
38. 46 U. S. C. A. 1304(2)(q).

The doctrine of "seaworthiness" as it has been expanded by this Court since the decision in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946), has brought confusion and incongruity into the law. Since it is so clear that the *Sieracki* decision was founded upon an incorrect factual basis, we suggest that it should be repudiated. Certainly it should not be expanded. This seems to be so for the additional reason that if the shipowner has a sufficiently large trade in a particular port to justify maintaining his own stevedoring department, he can employ the longshoremen directly. The injured longshoreman is then precluded by Section 5 of the Compensation Act from maintaining any action other than that provided by the Compensation statute.[39]

## CONCLUSION.

Certiorari should be granted to review this decision which imposes vicarious liability upon petitioners for negligence of the stevedore engaged to unload its vessel. The stevedore is likewise petitioning for certiorari but that is a different question. The court below did not find its support for decision in the "seaworthiness" doctrine but held petitioners liable for the negligence of another. That only compounds unequal protection as between the carrier by water and the rail, truck and air carriers. It also makes very unequal the protection afforded the smaller carrier as compared with the large carrier by water who can afford to equip and staff its own stevedoring division, thereby insulating itself from all liability except under the Compensation statute. The longshoreman employed by the stevedoring contractor has quite different remedies from

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39. *Samuels v. Munson S. S. Lines*, 63 F. 2d 861 (C. A. 5, 1933); *Smith v. The Mormacdale*, 198 F. 2d 849 (C. A. 3, 1953); cert. denied 345 U. S. 908; *Bennett v. The Mormacteal*, 254 F. 2d 138 (C. A. 2, 1958); *Ginnis v. Southerland*, 313 Pac. 2d 678 (Wash.). This method of operation is apparently expanding. Compare *Goodhart v. United States Lines Co.*, 26 F. R. D. 163.

the longshoreman employed by the large carrier, such as Moore-McCormack Lines, Inc. or Grace Line, Inc. See cases cited in footnote 39.

The decision here should be reversed. It is respectfully suggested that in doing so, the Court might well consider a re-examination of the whole unseaworthiness doctrine stemming from *Seas Shipping Co. v. Sieracki.*

Respectfully submitted,

T. E. Byrne, Jr.,
Krusen, Evans and Byrne,
21 South Twelfth Street,
Philadelphia 7, Penna.,
*Attorneys for Petitioners.*

## OPINION OF U. S. C. A. 3.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

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No. 13,278.

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LEIGHTON BEARD

*v.*

ELLERMAN LINES, LTD., and THE CITY LINE, LTD.,
*Appellants,*

*v.*

ATLANTIC AND GULF STEVEDORES, INC.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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Argued October 18, 1960.

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

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OPINION OF THE COURT.

(Filed April 7, 1961.)

By KALODNER, *Circuit Judge.*

The plaintiff, Leighton Beard, brought this civil action, founded upon the diversity jurisdiction of the District Court,[1] against the defendants, Ellerman Lines, Ltd.

1. Plaintiff is a citizen and resident of Pennsylvania; defendants Ellerman Lines, Ltd. and The City Line, Ltd., are British corporations.

and The City Lines, Ltd. ("Ellerman"), to recover damages for personal injuries sustained in the course of discharging cargo from the latter's vessel, S. S. "City of Calcutta". Beard was a longshoreman in the employ of Atlantic and Gulf Stevedores, Inc. ("Atlantic"), a concern performing stevedoring services for the vessel. Beard's complaint alleged unseaworthiness and negligence. Ellerman joined Atlantic as third-party defendant, alleging in its third party complaint that Beard's injuries were the result of Atlantic's negligence in discharging the cargo and in using devices which were "dangerous and improper" in doing so. Ellerman sought indemnity from Atlantic, under their contract, in the event it was held liable to Beard.

The case was tried before a jury, which found in answer to specific interrogatories, in favor of Beard in his action against Ellerman, and against Ellerman in its third-party action against Atlantic. In its answers to the interrogatories the jury found the "City of Calcutta" was unseaworthy and negligent, and Atlantic without fault with respect to the accident which resulted in Beard's injuries. The District Court entered judgment in accordance with the jury's special findings in favor of Beard against Ellerman and in favor of Atlantic against Ellerman in the third-party proceedings. It later [2] denied Ellerman's alternative motions to set aside the verdict in Beard's favor or for a new trial.

Ellerman has appealed, asserting in sum that the evidence failed to establish unseaworthiness or negligence on its part; that the jury's finding that Atlantic was not negligent is inconsistent with its finding of negligence against Ellerman since if there was any negligence it was that of Atlantic; and that Ellerman is entitled to indemnity from Atlantic as "a matter of law", if we find that the

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2. Ellerman's motions were filed May 7, 1958 and orally argued on June 24, 1959. The District Court's Order denying the motions was filed April 4, 1960.

record sustains a finding of negligence in the discharge of the cargo.

The District Court did not file an opinion and it is necessary for that reason to set forth the facts in some detail:

On July 1, 1955, the "City of Calcutta" docked at a pier in Philadelphia. In its cargo were bales of burlap which had been loaded aboard in India. The bales each contained 30 to 40 bolts of burlap, enclosed in a burlap covering. Each bale, weighing between 1,000 to 1,200 pounds, had been compressed under tremendous pressure and circled with four parallel one inch steel bands fastened together with a patented clip or buckle. Sixty three tons of the bales, consigned to New York, were stowed in the forward end of the hold, which, by reason of the shear of the vessel, extended out halfway into the square of the hatch; and 100 tons of the bales, consigned to Philadelphia, were stowed toward the after end of the deck. The bales were stowed on their flat in tiers to the same height, and there was no separation between them except for their markings.

Atlantic's longshoremen started discharging the cargo at about 1:30 P. M. They used what are known as bale or burlap hooks which consist of a metal ring to which six lengths of manila rope are attached. At the opposite end of each rope there was a special flat metal hook. Two of these hooks were inserted under two bands of each of three bales by four longshoremen, two on each side of the bales, and a fifth man put the ring on the cargo hook at the joined ends of the runners from the cargo winches and gave the signal for the draft to be hoisted. The draft was then moved out into the square of the hatch under the hammer of the boom, which was positioned over Philadelphia bales, and hoisted out of the hold, across the ship and then lowered on to the pier.

The first of the bales were removed from the center of the hatch and then the bales were moved out from the wings one row or tier at a time. The New York bales were

not touched. There was enough space between the top tier of bales and the underside of the 'tween deck for the longshoremen to walk into the wings, and as a draft was hoisted they retreated into them.

At about 4.30 P. M. (three hours after the unloading had begun), when two tiers of the Philadelphia cargo had been discharged, a draft of three bales was attached to a set of burlap hooks by the longshoremen. These bales were in a row in the offshore wing under the coaming with approximately 12 feet of space above. As the draft, in the course of its hoisting, neared the coaming of the main deck hatch the middle bands of one of the bales broke and when the entire weight of the bale was placed upon the other band it too broke, and the bale dropped onto the New York bales, bounced off, bounded across one-half of the hatch, then some 20 to 25 feet astern of the after coaming, and struck Beard, pinning him against the after bulkhead.

Beard was taken to the hospital where his right leg was amputated, first below the knee and shortly thereafter above the knee. He was 41 years old at the time.

The facts, as stated, are not in dispute, nor is there any question presented here with respect to the amount of the jury's award of damages to Beard.

There was considerable testimony at the trial, expert and otherwise, that it was the custom in Philadelphia to use bale hooks in discharging bales similar to the type here involved, known as "gunnies"; that the Safety Rules for the safe handling of cargo, prepared by the Philadelphia Marine Trade Association, and used by stevedore personnel in Philadelphia, approved this procedure.

There was also testimony, by way of deposition of Donald Quinn chief officer of the "City of Calcutta" that Quinn had observed the manner in which the vessel's cargo of bales of wool as well as the bales of burlap were being discharged by Atlantic's men and that "they were going very quickly"; that Quinn had told one of Atlantic's men "with a bit of authority" that he thought the use of bale

hooks in discharging the bales of wool "was a dangerous way of discharging" and that he was informed "it was the custom of the port". Quinn also said that he had "explained" to Atlantic's men that "in India they get wire slings and put them around the bales so that each individual bale has a wire around it, and as they hold it tight, the wire tightens around it."

Quinn, however, did not direct Atlantic's men to discontinue their method of discharging the bales. There was expert testimony that the chief mate is responsible for the safety of personnel engaged in cargo operations and that his authority outranks the stevedore boss.

An expert metallurgist who had tested steel bands similar to those used here testified that in his opinion the particular bands on the bale that broke and struck Beard had "something wrong with the materials".

The foregoing presents the factual situation as presented to the jury.

On this appeal Beard contends that the jury's finding of unseaworthiness is amply supported for these reasons:

"Ellerman had actual and constructive knowledge that the burlap bales would be hoisted out of the hold by use of hooks inserted under the bands of the bales", and, "It was therefore charged with the absolute duty of supplying bands to permit that activity to be accomplished in reasonable safety"; in the instant case "the bands were inadequate", and the burlap bales created an unseaworthy condition because they were not capable of "being handled for the purpose of loading and discharge" by the bale hook method customary in Philadelphia.

Beard further contends that the jury's finding of negligence on Ellerman's part was supported by the testimony that Ellerman had failed to provide him with a "safe place to work" in that (1) Ellerman breached its duty "to use reasonable care to ascertain the methods and manner in which the work was done and to forbid the use of a method which was hazardous to his [Beard's] safety" and the failure of the chief mate to take effective

measures to prevent an unsafe method of discharging the burlap bales constituted negligence; further (2) Ellerman's "failure to discharge the New York bales in that port rendered the place of work unsafe and the defendant negligent", inasmuch as had the New York bales been discharged in New York the bale which had dropped would "normally strike a flat surface and roll or bounce but a few feet", while here the dropped bale "bounced off and rolled all the way to the after bulkhead of the No. 1 hold, one-half the distance of the square of the hatch, and in addition, 20 to 25 feet underneath the after 'tween deck."

Atlantic's position is that the jury's finding, in answer to Interrogatory No. 4, that the "fault" of Ellerman did not "arise out of any failure" on its part, was supported by the evidence that its use of the bale hook method was customary and not negligent; that the jury's finding that Ellerman was negligent could properly have been premised on its failure to provide Beard with a "safe place to work" in that it had not discharged the New York bales at that port and they were so stowed that Beard was exposed in the discharging operation to the catapulting of the dropped bale which caused his injuries.

Atlantic contends that, for the reasons stated, the jury's finding with respect to it is not inconsistent with its finding that Ellerman was negligent.

The District Court, in its charge, dealt with the theories of Ellerman's negligence advanced by Beard.

On the score of the jury's finding, in answer to Interrogatory No. 2, that Ellerman was negligent, Ellerman[3] and Atlantic both urge that the answer fails to disclose whether it was based on (1) use of the bale hook method in discharging the burlap bales; or, (2) failure of Quinn, Ellerman's chief mate, to stop Atlantic from pursuing the bale hook method of discharge which he had characterized as "dangerous"; or, (3) failing to provide Beard with a

3. Ellerman says: "It is impossible to tell what conduct by Ellerman was found to constitute the conclusion 'negligence' ".

safe place to work in view of Ellerman's failure to discharge the New York bales at that port and their position with relation to the bales which were being discharged at the time of the accident.

Interrogatory No. 2 which presented to the jury the issue as to whether Ellerman was negligent reads as follows:

> "Was there negligence on the part of Ellerman Lines, Ltd., which was a substantial factor in causing injuries to the plaintiff?"

The jury's answer to the interrogatory was "Yes".

In disposing of Ellerman's appeal from the jury's finding that its negligence "was a substantial factor in causing injuries to the plaintiff", we are required only to determine whether there was substantial evidence adduced at the trial with respect to any one of the three theories of negligence on Ellerman's part which measured up to the applicable standard of legal proof and thus permitted the jury's fact-finding that Ellerman was negligent.

On the score of whether the record affords a substantial basis for a finding that Beard's injuries were caused by *somebody's* negligence in the discharge of the burlap bales this extraordinary situation presents itself:

Both Ellerman and Atlantic do not really question that sufficient evidence was adduced in the record to establish that Beard was injured as a result of negligent conduct of the discharging operation; indeed they virtually concede that the record establishes such negligence—they only differ as to the nature of the negligent acts and with respect as to who was guilty of the negligent conduct.

Says Ellerman, in its brief:[4]

> "We dispute that Ellerman was negligent and assert rather that the negligence here was *solely* that of the stevedore [Atlantic]." (Ellerman's emphasis.)

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4. Page 22 "Brief for Appellant".

That statement was made in consonance with Ellerman's position that Atlantic was in full control of the discharging of the cargo; it was an "expert in the field"; "It was Atlantic's method of pulling out the cargo, not Ellerman's"; "Ellerman would not be negligent for failing to either supervise or take over and itself perform the details of the work"; and, while Atlantic's negligence would make Ellerman liable to Beard, Ellerman was thereby entitled to indemnity from Atlantic under their contract for stevedoring services because of Atlantic's "sub-standard" performance.[5]

Atlantic, replying to Ellerman's contention here that the jury's finding of negligence on its part was inconsistent with its finding, in answer to Interrogatories Nos. 4 and 5, that Atlantic was free of fault, made this statement in its brief:[6]

> "Appellant [Ellerman] conveniently fails to acknowledge that other issues were submitted *upon which the Jury could properly have found negligence on the part of the shipowner.* Plaintiff, through his counsel, contended that Ellerman was negligent in failing to provide Plaintiff with a safe place to work. Evidence was offered which established that certain New York cargo was not removed at that port, was stowed in a position exposed to this unloading operation and was the very means by which the falling bale was catapulted against Beard. . . .
>
> ". . . *The Jury could properly find and by its verdict undoubtedly did find that Ellerman was guilty of negli-*

5. In its third-party complaint against Atlantic, Ellerman averred that if it should be held liable to the plaintiff "then the third party is liable over" to it "by reason of" Atlantic's failure "to properly perform the work of unloading"; Atlantic "*was negligent in the manner in which it undertook to unload cargo*"; Atlantic "supplied and used devices in connection with the unloading . . . which were dangerous, improper and, in addition, violated the terms of the [stevedoring] agreement." (Emphasis supplied.)

6. Pages 8-9 "Brief for Atlantic and Gulf Stevedores, Inc., Appellee".

*gence in stowing the New York cargo with the Philadelphia cargo in the center of the hatch opening.*

"From the description of the accident by all the eyewitnesses, *it is clear that the accident would not have occurred had the falling bale not struck the New York cargo and rolled under the coaming against Beard.* (emphasis supplied).

In view of what has been said it is unnecessary for us to discuss in detail all the evidence relating to the issue of negligence. We have but to say that the record affords ample basis for the jury's finding that Ellerman was negligent.

For example, there was evidence that bands of bales "broke" in "roughly between 3 and 5 percent of the bales" during discharging operations.[7] It is true that there was considerable testimony, as earlier stated, that it was the custom in Philadelphia to use bale hooks in discharging burlap bales and that the method was approved by the Philadelphia Marine Trade Association, but as we held in Curtis v. Garcia Y Cia., 272 F. 2d 235, 237 (1959) "such custom, though it may be evidence of reasonableness, is not conclusive," and the jury may find, if there is sufficient basis in the testimony, that the customary method does "not satisfy the standard of reasonable care."

Further, there was testimony by Ellerman's own chief mate, Quinn, earlier referred to, that in his opinion the use of bale hooks "was a dangerous way of discharging", and that he had "explained" to Atlantic's man that in India, in handling burlap bales they used the sling method.

On the score of Quinn's testimony it must be said that his failure to take effective measures to stop the use of the discharge method which he condemned as "dangerous", would constitute negligent conduct for which Ellerman was liable in the event of a jury finding that the discharging procedure was in fact "dangerous", as he deemed it to be.

7. Testimony of Captain William Wheeler, associated with a firm of marine consultants.

Also, there was testimony that those engaged in the task of discharging the bales were exposed to a hazardous situation, by virtue of the stowage of the New York bales with respect to the bales which were being unloaded, and thus were not afforded a "safe place to work", which is, of course, negligence on the part of those responsible. The testimony on this score, as earlier stated ,was deemed ample by Atlantic, an expert in the field, to sustain a finding that Ellerman had failed to provide "a safe place to work".

It is settled law that Ellerman owed to Beard the obligation to provide him with a safe place to work, and its failure to do so constituted negligence.

It is equally settled that Ellerman was under a duty to use methods which complied with the standard of reasonable care in the discharge of its cargo, and to forbid the use of a discharge method by the stevedore of its selection which did not conform to a standard of reasonable care.

"The work of loading and unloading is historically 'the work of the ship's service' ", as the Supreme Court said in [illegible].

Whatever inconsistency Ellerman sees in the jury's answers to Interrogatories Nos. 2 (in which it was held negligent) and 4 (in which Atlantic was absolved from liability over to Ellerman), it is not one which aids Ellerman in Beard's action against it. In answering Interrogatory No. 2, the jury was determining the issue of negligence between Beard and Ellerman. In answering Interrogatory No. 4, the jury was determining, necessarily, the contractual obligation of Atlantic to Ellerman. The issue for us on appeal with respect to this Interrogatory is whether as a matter of law Atlantic can be relieved of its contractual obligation in any circumstance of this case. The fact, that the jury believed either that the contractual obligation of Atlantic to Ellerman did not coincide with the duty of Ellerman to the plaintiff, or that Atlantic properly discharged its contractual obligations, if erroneous, would not require that we reverse the finding of liability as between the plain-

tiff and Ellerman, if that finding is supported by the evidence, as we have found that it does.

What has been said brings us to Ellerman's contention that if it "is liable to Beard upon a theory of negligence . . . the undisputed evidence required the District Court to enter . . . judgment in Ellerman's favor [against Atlantic] because it was clearly Atlantic's action which brought about the result and clearly it constituted a breach of a warranty of workmanlike service."

Our consideration of Ellerman's contention is controlled by the principles recently summarized in Waterman Co. v. Dugan & McNamara, 364 U. S. 421, 423 (1960), as follows:

> "In *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124, it was established that a stevedoring contractor who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's breach of his warranty to perform the obligations of the contract with reasonable safety. *This warranty of workmanlike service extends to the handling of cargo, as in Ryan, as well as to the use of equipment incidental to cargo handling*, as in *Weyerhaeuser S. S. Co. v. Nacirema Co.*, 355 U. S. 563. The warranty may be breached *when the stevedore's negligence does no more than call into play the vessel's unseaworthiness. Crumady v. The J. H. Fisser*, 358 U. S. 423, 429. . . ." (emphasis supplied).

Application of the principles stated to the indemnity action compels the determination, under the particular facts here and the jury's finding with respect to Ellerman's negligence, that Ellerman is entitled to indemnity from Atlantic as a matter of law.

As already pointed out, the record affords ample basis for a jury fact-finding that (1) use of the bale hook method in the discharge of the burlap bales constituted negligence, and (2) that the injured longshoreman was not afforded a safe place to work.

Atlantic suggests that the jury's finding that Ellerman was negligent was based on its failure to provide a safe place to work in view of the fact that the New York cargo "was stowed in a position exposed to this unloading operation and *was the very means by which the falling bale was catapulted against Beard*", and says that "*the jury could properly have found negligence on the part of the shipowner*" in this situation, *and "it is clear that the accident would not have occurred had the falling bale not struck the New York cargo and rolled under the coaming against Beard.*" (emphasis supplied.)

Atlantic hoists itself on its own petard in stating that the evidence established that the New York stow, as positioned when the Philadelphia bales were being discharged, created an unsafe place to work.

Under the principles above stated, the "warranty of workmanlike service to perform the obligations of the contract with reasonable safety", extends to the handling of the cargo, and thus if it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic to "handle" the cargo in the unsafe place to work.

It was Atlantic's conduct in proceeding to unload cargo in an unsafe place to work which "called into play" the unsafe condition which prevailed, and under Crumady v. The J. H. Fisser, *supra*, it breached its warranty to Ellerman.

What was said in American President Lines v. Marine Terminals Corp., 234 F. 2d 753, 759, 60 (9 Cir. 1956), cert. den. 352 U. S. 926, is significantly applicable here:

> ". . . We are not concerned here with a situation in which the stevedore's breach of duty brings about the injuries by operation upon a prior condition caused by the shipowner's negligence which is unknown to the stevedore. Here the stevedore was fully informed of the fact and of the possible consequences of the shipowner's negligence . . . and in face of all that

> proceeded to breach its duty so as to make that negligence an immediately dangerous force . . .[I]t was the stevedore's breach of duty that created the danger and made it an active condition with immediately forseeable consequences of personal injury."

The "expertise" of Atlantic in the handling of cargoes should have made it aware of the dangers inherent in the discharge of the Philadelphia bales in view of the presence of the New York stow. If a jury could "properly find", as Atlantic urges, that Ellerman was negligent in permitting the discharge under the circumstances which prevailed, because of their obvious dangers, it certainly follows that Atlantic, an expert in the field of handling cargo, should have shown an awareness of the situation and taken steps to avoid that which happened or refused to proceed with the discharge of the cargo until the site of discharge was made "a safe place to work."

It must here be noted that the District Court in its charge to the jury with respect to work indemnity action

It must here be noted that the Dist arried on the discharge to the jury with respect to the ace unsafe to work failed to instruct it that if Atlantic ca warranty [to Ellercharge of the Philadelphia bales in a plac contract with reathat it was guilty of a breach of its "wa man] to perform the obligations of the c respect and to its sonable safety."

the jury, in its an-

The District Court erred in this re Atlantic of "any error may be attributed the fact that the dance with its answer to Interrogatory No. 4 acquitted failure . . . to do its work in accordan the District Court tractual obligation."

, of Atlantic's per-

Further, in its charge to the jury th prescribed the "criterion", as it put it, o r not there was an formance of its contract, as follows:

cargo, an unsafe

> "You will have to decide whether or this cargo, in the unreasonable discharge of this ca method used in the discharge of thi placing of the hook."

The phrasing of this instruction was such that it made the sole "criterion" of the jury's test as to whether Atlantic had breached its contract of "workmanlike service" in the use of the bale hook method in discharging the cargo.

The error of this instruction, as well as the error committed when the District Court failed to instruct the jury that it was a breach of Atlantic's contract to carry on the discharging operation in an unsafe place to work, was further compounded by a last-minute instruction to the jury, following conclusion of the charge in chief, and just before the jury retired. The instruction referred to follows:

> "If you find that Atlantic & Gulf Stevedores, Mr. Marshall's client, was unloading the bales in a proper and safe manner, *using a method that was in accordance with the practice, customs, and usage in the Port of Philadelphia,* and that that was not in violation of their breach of contract which obtained between them, *then your verdict must be in favor of the Atlantic & Gulf Stevedores.*" (emphasis supplied.)

It may be noted that exception was taken to this instruction by Ellerman.

In summary, we are of the opinion that the testimony adduced afforded ample basis (as Atlantic itself says) for a jury finding that the discharge of the Philadelphia bales was carried on in an unsafe place to work and while that finding made Ellerman liable to Beard it also made Atlantic liable, as a matter of law, to Ellerman for indemnity for its breach of warranty as previously detailed.

The opinion stated makes it unnecessary for us to consider the issue of unseaworthiness [8] which was premised on Beard's view that the doctrine of unseaworthiness ex-

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8. Hudgins v. Gregory, 219 F. 2d 255 (4 Cir. 1955).

tends to the packaging of the ship's cargo;[9] and that the cargo in the instant case was "unseaworthy" by reason of the "inadequacy" of the steel bands used to bind the burlap bales.

For the reasons stated the judgment of the District Court in favor of the plaintiff Leighton Beard and against the defendants, Ellerman Lines, Ltd. and The City Line, Ltd. will be affirmed, and the judgment in favor of the third-party defendant, Atlantic & Gulf Stevedores, Inc. and against the third-party plaintiff, Ellerman Lines, Ltd. and The City Line, Ltd. will be reversed, and the cause remanded with directions to the District Court to proceed in accordance with this opinion.

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9. It may be noted that plaintiff relies in this respect on the holding of the Second Circuit in Reddick v. McAllister Lighterage Co., 258 F. 2d 297 (1958), cert. den. 358 U. S. 908 where it was said (p. 299):

". . . the holding of unseaworthiness may also be predicated on the latent defect in the cargo crate". But see Carabellese v. Naviera Aznar, S. A., 285 F. 2d 355 (1960) where the Second Circuit limited *Reddick* to its particular facts and said it was "not disposed" to extend the doctrine of unseaworthiness to include "cargo safe to handle".

## JUDGMENT OF U. S. C. A. 3.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,278

LEIGHTON BEARD

*v.*

ELLERMAN LINES, LTD., AND THE CITY LINE, LTD.,
*Appellants,*

*v.*

ATLANTIC & GULF STEVEDORES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: MCLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in favor of the plaintiff Leighton Beard and against the defendants Ellerman Lines, Ltd. and The City Line, Ltd., be and the same is hereby affirmed, with costs; and the judgment in favor of the third-party defendant, Atlantic & Gulf Stevedores, Inc. and against the third-party plaintiff, Ellerman Lines, Ltd. and The City Line, Ltd. be, and the same is hereby reversed, with costs; and the cause remanded with directions to proceed in accordance with the opinion of this Court.

ATTEST:
IDA O. CRESKOFF,
*Clerk.*

April 7, 1961